

K9IPHALO

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

-----x

3 UNITED STATES OF AMERICA,

4 v.

15 CR 867 (RMB)
Oral Argument
Teleconference

5 HALKBANK, ET AL.,

6 Defendants.

7 -----x

8 New York, N.Y.
9 September 18, 2020
10 9:30 a.m.

11 Before:

12 HON. RICHARD M. BERMAN,

13 District Judge

14 APPEARANCES VIA TELEPHONE

15 AUDREY STRAUSS,
16 Acting United States Attorney for the
17 Southern District of New York
18 BY: SIDHARDHA KAMARAJU
19 MICHAEL LOCKARD
20 DAVID W. DENTON, JR.
21 JONATHAN REBOLD
22 KIERSTEN A. FLETCHER
23 Assistant United States Attorneys

24 WILLIAMS & CONNOLLY, LLP
25 Attorneys for Defendant Halkbank
BY: ROBERT M. CARY
SIMON A. LATCOVICH
DAMAYANTI DESAI
JAMES KIRKPATRICK

K9IPHALO

(The Court and all parties appearing telephonically)

THE COURT: This is Judge Berman. I think we're ready to begin, and I would ask everybody who is not speaking or is not speaking at the particular time, if you can, to mute your phone so we don't have background noise.

Second, I would ask everybody to introduce themselves when they are about to speak. So, for example, this is Richard Berman, and I'm introducing the oral argument on Defendant Halkbank's motion to dismiss the indictment.

We are proceeding today in light of the fact that the Court of Appeals yesterday evening denied the defense application to stay the proceedings and the District Court, that is to say myself, by decision and order had denied the application made to the District Court for stay of these proceedings.

So with that in mind, we will proceed pursuant to an earlier order that I had issued indicating that each side would have 20 minutes and may reserve time for rebuttal, if you wish.

So we'll start with the defense. Mr. Cary, would you introduce your team and who will be making the presentation today?

MR. CARY: Yes, your Honor. It's Rob Cary for the defense. With me is Simon Latcovich, Damayanti Desai and James Kirkpatrick on the phone in different places. And Mr. Latcovich will be making the argument today, your Honor.

K9IPHALO

1 THE COURT: Okay. Does the court reporter have the
2 spelling of each of the names?

3 THE REPORTER: I have Mr. Latcovich's name. I do not
4 have the other names.

5 THE COURT: If you could provide, just so that the
6 record is clear, the spellings?

7 MR. CARY: Yes, your Honor. James Kirkpatrick is
8 spelled J-a-m-e-s, Kirkpatrick is K-i-r-k-p-a-t-r-i-c-k, and
9 Damayanti, D-a-m-a-y-a-n-t-i, is the first name, and the
10 surname is D-e-s-a-i.

11 THE COURT: That's great.

12 Okay. Mr. Latcovich, I think you have the floor.

13 MR. LATCOVICH: Thank you, your Honor. Good morning.
14 Simon Latcovich on behalf of Halkbank.

15 Your Honor, given the limited time, I plan today to
16 focus my efforts on sovereign immunity, but I will have
17 something brief to say about all of our arguments to dismiss
18 this indictment, and I'm going to try to reserve approximately
19 five minutes for rebuttal, but we'll see how that goes.

20 THE COURT: Okay.

21 MR. LATCOVICH: Starting with --

22 THE COURT: I just wanted you to know, I do have I
23 think enough time. I'm not going to cut anybody off, you know,
24 in the middle of an idea. So you will certainly have five
25 minutes or ten minutes, if you need it, for rebuttal, no matter

K9IPHALO

1 how much time of the 20 minutes you use during your
2 presentation.

3 MR. LATCOVICH: Understood, your Honor. Thank you.

4 So let's just jump right into sovereign immunity, your
5 Honor. This doctrine creates an unusual posture for a criminal
6 case. It's the government that has to meet certain burdens,
7 not the defense, and we don't believe the government can meet
8 the multiple burdens it needs to continue this prosecution.

9 So starting with subject matter jurisdiction, your
10 Honor, I think that I can even get the government to agree that
11 this Court cannot proceed without subject matter jurisdiction.
12 And as various courts have analyzed the issue, sovereign
13 immunity is really a question of subject matter jurisdiction.
14 Although the parties disagree on which is applicable, there are
15 two potential bases for subject matter jurisdiction over
16 Halkbank; the first is the Foreign Sovereign Immunity Act, and
17 the second is 18 U.S.C. 3231, the general criminal
18 jurisdictional statute.

19 Now, let's start with the Foreign Sovereign Immunities
20 Act. If this is the source of subject matter jurisdiction for
21 this case, then Halkbank is immune and the case must be
22 dismissed. 28 U.S.C. 1330(a), by its plain terms, limits
23 Federal Court jurisdiction to "non-jury civil actions" against
24 foreign states. The argument is simple. The SSIA does not
25 provide jurisdiction for either jury actions in civil matters

K9IPHALO

1 or in criminal matters. And as the Supreme Court said in the
2 *Amerada Hess* matter, the SSIA provides "the sole basis for
3 obtaining jurisdiction over a foreign state." If that plain
4 language means what it says, then that's the end of this
5 argument.

6 Now, in response, your Honor, the government argues
7 that Congress could not have limited criminal matters against
8 foreign states without saying more in the SSIA. Well, your
9 Honor, we submit that the plain language says more than enough
10 and it means what it says. But no matter because the
11 government hasn't identified any pre-SSIA criminal cases
12 against foreign sovereigns.

13 Against that background, Congress wasn't limiting
14 anything when it passed the Foreign Sovereign Immunities Act.
15 Instead, it was ratifying 200 years of status quo. If the
16 executive branch wants to indict foreign states, it should ask
17 Congress to change the law, not ask this Court to ignore the
18 plain language of the statute.

19 Now, I'd like to turn to the other potential basis for
20 subject matter jurisdiction, and that is the general criminal
21 jurisdictional statute, 18 U.S.C. 3231. I think the
22 government's argument can be boiled down to this, because that
23 statute gives jurisdiction over "all offenses against the
24 United States," this must include foreign sovereigns.

25 Your Honor, I think this argument is clever but it's

K9IPHALO

1 too clever by half because it proves too much. First, such an
2 interpretation runs the risk of gutting the SSIA. For example,
3 and as we noted in our reply papers, federal question
4 jurisdiction is set forth in 28 U.S.C. 1331. And similar to
5 the criminal jurisdictional statute, it gives federal courts
6 jurisdiction over "all civil actions" arising under federal law
7 or the Constitution.

8 If the government interprets this statute like it does
9 the criminal jurisdictional statute, then the Foreign Sovereign
10 Immunities Act does not apply to federal question matters. And
11 I think an example is probably best helpful here, your Honor.
12 If I, for some reason, sued a foreign state instrumentality for
13 10(b)(5) securities fraud, the subject matter jurisdiction
14 would be decided by the Foreign Sovereign Immunities Act, not
15 the federal question jurisdictional statute.

16 The same should be true in this criminal matter, and I
17 think, your Honor -- I mean, the government's attempt to rely
18 on this general criminal jurisdictional statute conflicts with
19 a basic statutory canon of construction, the general specific
20 canon. If there's a conflict between a general provision and a
21 specific provision, the specific provision prevails. In a case
22 that actually involves foreign sovereigns, the statute that
23 actually addresses jurisdiction for foreign sovereigns should
24 prevail.

25 So to recap, your Honor, we think the government

K9IPHALO

1 cannot clear its initial hurdle here of the basis for subject
2 matter jurisdiction. The SSIA's language is plain, should not
3 be read to do violence to other statutes, and we think it means
4 that there is no subject matter jurisdiction here.

5 THE COURT: Thank you. Mr. Latcovich, if I can
6 interrupt for one moment.

7 I underscore, for those who are participating or
8 listening in to today's oral argument, it is public, to mute
9 your telephone if you are not a speaker. It is distracting to
10 have the background noise effecting the oral argument, and I
11 would ask everybody again, who is not speaking, to please mute
12 your phone to cut out the background noise.

13 Mr. Latcovich, I know it's implicit in everything
14 you're saying, but we should just make clear on the record that
15 the arguments are premised upon the fact that the defendant,
16 Halkbank, is a state-owned bank; isn't that correct?

17 MR. LATCOVICH: That's absolutely correct, your Honor.
18 The indictment alleges that, and the indictments -- the
19 allegations in the indictments set forth the sufficient facts
20 to establish that Halkbank is an instrumentality of a foreign
21 state, as defined under 28 U.S.C. 1603. And I did not read the
22 government's opposition to dispute that; so I chose not to
23 address that argument here, but that is correct, your Honor.

24 THE COURT: I got it. I just wanted to clarify.
25 Okay. Please continue.

K9IPHALO

MR. LATCOVICH: Thank you, your Honor.

So even if, for some reason, this general criminal jurisdiction statute trumps the more specific Foreign Sovereign Immunities Act, that doesn't end the discussion. The Foreign Sovereign Immunities Act still applies. Indeed, the government's favorite case, or at least it's favorite case in its papers, the *In Re: Grand Jury Subpoena* case from the DC Circuit, assumed as much in it's reading. Although, frankly, it was tough to discern that from the government's description of the case.

So let's turn to potential application of the SSIA, which I think boils down to whether any of the statutes listed exceptions to immunity apply here. Now, we briefed the issue of whether section 1605's exceptions apply at all in criminal matters, and I don't intend to address that argument here.

But assuming for the sake of argument that they do apply, the commercial activities exception, which is the only basis cited by the government, doesn't apply in this particular matter for a few reasons, your Honor. First, the actions at issue here are inherently sovereign and not commercial. Although the definition of commercial is not a model of clarity, your Honor, courts have held that an activity is "commercial" only if those same powers can be exercised by private citizens.

Here, we're talking about processing Iranian oil and

K9IPHALO

1 natural gas transactions. The Republic of Turkey designated
2 Halkbank, under the National Defense Authorization Act, to
3 process these transactions. By definition, this is the type of
4 activity that cannot be exercised by private citizens, making
5 it sovereign and not commercial.

6 But, your Honor, even if the government somehow clears
7 that hurdle and this could be deemed some sort of commercial
8 activity, the commercial activity exception itself states that
9 this case, our litigation, must be "based upon" one of the
10 three listed commercial activities. Again, the government
11 can't meet that burden. The Supreme Court in *OBB*
12 *Personenverkehr AG v. Sachs* -- and I'll spell *Personenverkeher*,
13 P-e-r-s-o-n-v-e-r-k-e-h-r -- the Supreme Court held that for a
14 claim to be based upon particular conduct, it must be the focus
15 or as it described it, the "gravamen of the suit." And that,
16 your Honor, is where the government's indictment starts to take
17 on water.

18 But to fully understand the government's problem,
19 we've got to go back to the time when the government sought
20 this indictment. In the fall of 2019, the government believed,
21 as it told this Court and the Second Circuit, that attempts to
22 evade secondary sanctions were a crime.

23 Halkbank's indictment reflects this focus, alleging
24 that the point of Halkbank's participation in the alleged
25 conspiracy was to create some sort of pool of Iranian oil funds

K9IPHALO

1 in Turkey and the United Arab Emirates. And those allegations,
2 for example, are contained in indictment paragraph 6. Indeed,
3 the indictment even purports to total this alleged amount,
4 claiming \$20 billion.

5 The problem is is that this movement of money to
6 allegedly create these pools isn't a crime after the *Atila*
7 decision in the Second Circuit. So in an attempt to salvage
8 its Halkbank indictment from this change in law, the government
9 says don't focus on the \$20 billion. Instead, it claims that
10 \$1 billion touched U.S. banks.

11 Okay. Maybe so. That's what the allegation says, but
12 you can't take that out of context and pretend that that's the
13 gravamen of this indictment. It just isn't. I mean, by
14 definition, U.S. dollar transactions were not necessary to the
15 alleged scheme or the scheme failed 95 percent of the time. No
16 matter how the government tries to spin it, the gravamen of
17 this case just can't be five percent of the transactions in the
18 alleged scheme.

19 The government indicted Halkbank under a now-debunked
20 legal theory, and that has ramifications, your Honor. In this
21 case, the gravamen of the lawsuit or the indictment of
22 secondary sanctions and that does not pass muster under the
23 "based upon" standard of the commercial activities exception.
24 Therefore, this Court need not reach the three individual
25 clauses in section 1605(a)(2). But as you probably heard me

K9IPHALO

1 say before, your Honor, if you get there, once again, the
2 government can't meet its burden.

3 For the first clause, which addresses commercial
4 activity within the United States, the government claims that
5 somehow a handful of discussions with Treasury officials
6 constitutes commercial activity in the United States. Your
7 Honor, we disagree. The government provides no support for
8 such a claim, and there is none. That kind of description or
9 exception would swallow the rule.

10 The second clause focuses on activities in the U.S.
11 that were made in connection with commercial activities outside
12 the U.S. So the activities in the U.S. don't have to be
13 commercial, your Honor. But critically here, the government's
14 brief omitted the standards. These actions are limited to
15 actions that are themselves sufficient to form the basis for a
16 cause of action.

17 These alleged statements to Treasury don't meet the
18 standard, and they can't be used to bootleg into this case the
19 otherwise unreachable foreign activity. Put simply, Halkbank
20 didn't need to allegedly lie to the U.S. government to conduct
21 transactions in Turkey or the United Arab Emirates, as the
22 imposition of secondary sanctions would not have changed
23 Halkbank's ability to engage in these transactions.

24 The government's sleight of hand here is this, your
25 Honor. The government's alleged lies are really about access

K9IPHALO

1 to correspondent bank accounts. Halkbank's correspondent bank
2 accounts aren't alleged to be part of the scheme. Therefore,
3 the statements here can't be the basis for the cause of action.

4 Finally, your Honor, for the third clause of the
5 commercial activities exception, Halkbank's actions must have a
6 direct effect in the U.S. So these are actions outside the
7 U.S. that have a direct effect on the commercial activities in
8 the U.S. This definition has been litigated, your Honor, and
9 the results don't help the government.

10 Direct effect means there must be a "immediate
11 consequence" of Halkbank sanctions in the U.S. But based on
12 the government's own allegations, there were no immediate
13 consequences. First, there was this supposed pool of money
14 traded overseas. That doesn't give rise to an immediate
15 consequence in the U.S. And, in fact, according to the
16 government's own allegations, 95 percent of that money never
17 even made it to the U.S. So it had no consequences whatsoever
18 in the U.S., much less an immediate consequence.

19 And given the intervening steps that occurred what
20 I'll call post-pool in Dubai, or Turkey and Dubai, that
21 depended on variables independent of Halkbank, there is no
22 argument that the U.S. dollar transactions could have been the
23 immediate consequences of Halkbank's actions.

24 So, your Honor, we submit that given the application
25 of the actual standards for the commercial activities

K9IPHALO

1 exception, as in interpreted by the Second Circuit and others,
2 Halkbank's activities do not fall within the commercial
3 activity exception.

4 Your Honor, so we would submit, I don't need to
5 summarize here, this Court has no subject matter jurisdiction,
6 and the entire indictment should be dismissed.

7 If I could, I'd like to just briefly touch on some of
8 the other arguments, your Honor?

9 THE COURT: Sure.

10 MR. LATCOVICH: Starting first with personal
11 jurisdiction. This will be very quick, your Honor. In it's
12 December 5th, 2019, order denying Halkbank's motion to enter a
13 special appearance, this Court has indicated how it intends to
14 rule on personal jurisdiction; so I don't know that it will be
15 helpful to spend any time here.

16 And so I'd like to move quickly to
17 extraterritoriality.

18 THE COURT: Sure.

19 MR. LATCOVICH: Regarding extraterritoriality, your
20 Honor, there is a strong foreign presumption against applying
21 criminal statutes to extraterritorial conduct. Everyone agrees
22 with that. It's what the Supreme Court has said. Incidental
23 contact with the U.S. is not enough.

24 Now, since the Court -- since this Court, since your
25 Honor last considered this issue, not only has the Second

K9IPHALO

1 Circuit clarified the standard, but the government has changed
2 its allegations, your Honor, for the first time claiming that
3 there was this \$20 billion pool overseas.

4 This new allegation puts the alleged U.S. conduct in
5 context and, by definition, makes it merely incidental. And
6 for that reason and the plain language of these statutes, we
7 believe that extraterritorial application is prohibited here.

8 As for bank fraud, your Honor, I have only one point
9 to make in addition to what we set forth in our pleadings. The
10 government claims in its opposition that our briefing gives no
11 reason for your Honor to "depart from its prior careful
12 conclusions" in the *Zarrab* case.

13 I submit, your Honor, that the government is half
14 right. The best reason to depart might not be our brief, but
15 rather, the differences between the *Zarrab* indictment, which
16 the Court relied upon in denying Zarrab's motion, and the
17 Halkbank indictment. Your Honor, the *Zarrab* indictment, as you
18 know, includes allegations regarding at least, at least, ten
19 specific U.S. dollar transactions. It includes amounts,
20 allegations about amounts, dates, parties to the transactions,
21 SWIFT messages, letters from exchange houses, et cetera, and
22 that's all found at ECF No. 7, paragraph 14.

23 The same is true for Atilla's indictment, your Honor.
24 That's at ECF 293, paragraphs 58 through 84. Again, U.S.
25 dollar transactions, amounts, dates, SWIFT messages, and

K9IPHALO

1 supposedly related communications.

2 By contrast, your Honor, the Halkbank indictment does
3 not include a single specific transaction. Not one. That's
4 why the government didn't properly allege the elements, which
5 we detailed in our papers. As the government pointed out, this
6 Court previously found that the government knows how to allege
7 bank fraud. Your Honor, it may have done so with Zarrab, but
8 it failed to do so here. Careful consideration of these claims
9 require dismissal.

10 And finally, your Honor, one point regarding
11 multiplicity. This is another example of how the *Atilla* Second
12 Circuit opinion created legal problems for the government in
13 this case, in an indictment that was returned before the Second
14 Circuit shifted the ground under their feet.

15 Your Honor, given that secondary sanctions aren't part
16 of this case, for the government to prove conspiracy to violate
17 IEEPA -- for Madam Court Reporter, that's I-E-E-P-A, all
18 capitals -- for the government to prove conspiracy to violate
19 IEEPA, it must prove a conspiracy to violate primary sanctions
20 which require U.S. dollar transactions.

21 But this same proof would also, by definition, prove
22 conspiracy to commit money laundering. And, your Honor, I've
23 read the government's opposition multiple times, and it notably
24 does not state anything to the contrary. For that reason, your
25 Honor, Count Six should be dismissed as multiplicitous of Count

K9IPHALO

1 One.

2 Thank you, your Honor.

3 THE COURT: I got it. And just to clarify,
4 Mr. Latcovich, when you were discussing the fact that there
5 were motions to dismiss and rulings in connection with alleged
6 co-defendants Reza Zarrab and Mr. Atilla, those were the
7 references that you were making and you are endeavoring to
8 distinguish between the basis of those motions, namely the
9 respective indictments, and you are pointing out or you are
10 contending that those indictments contain important
11 distinctions one from the other. Is that a fair summary?

12 MR. LATCOVICH: I think that's very close, your Honor.
13 You know, to be clear, it was the government that injected
14 these in their papers, injected the *Zarrab* and *Atilla*
15 pleadings, not us. We think those are different indictments
16 because they are. You can just see that by what they allege,
17 setting aside the formality of they are, in fact, a different
18 superseding indictment.

19 The contents of them differs, and the law has also
20 changed, your Honor, both in terms of extraterritoriality. For
21 example, we think the Second Circuit has clarified some of
22 these issues, as well as the Second Circuit's *Atilla* ruling
23 regarding secondary sanctions.

24 So, yes, it is -- we don't think that even normally
25 those decisions would be binding on Halkbank, a later-indicted

K9IPHALO

1 defendant. To the extent the Court considers them as some sort
2 of persuasive authority, we would distinguish them for many of
3 the reasons that you stated.

4 THE COURT: I got it. Okay. And I'm just trying to
5 summarize what you were saying.

6 MR. LATCOVICH: Right.

7 THE COURT: I'm not trying to inject my point of view
8 with respect to those issues.

9 Okay. Thanks. That's very helpful.

10 And who is going to argue for the government?

11 MR. KAMARAJU: Good morning, your Honor. This is Sid
12 Kamaraju on behalf of the government, and I'll be arguing
13 Halkbank's motion to dismiss. And with me are my colleagues
14 Michael Lockard, David Denton, Jonathan Rebold and Kiersten
15 Fletcher. And I believe the court reporter has all of their
16 names.

17 THE COURT: Okay. Thank you.

18 MR. KAMARAJU: Thank you, your Honor.

19 So there's a common thread that runs through all of
20 the defense's arguments, which is a mischaracterization of the
21 indictment and the scheme alleged therein. And in fact, while
22 the bank claims that the *Atila* decision limited the government
23 and required the government to change its theory to a new one,
24 the fact is the government's allegations are the same as they
25 were against a senior executive of the bank, Atila, and you

K9IPHALO

1 can see that in the language of the indictment.

2 Now, excluding forfeiture paragraphs, the indictment
3 contains 81 paragraphs. Halkbank has asked you to focus on one
4 sentence in one paragraph and not even the entirety of that
5 paragraph.

6 So Halkbank directed your Honor to paragraph 6 of the
7 indictment, which discusses the purpose, in effect, in creating
8 the pool. The very next sentence states that the purpose --
9 the very next sentence, excuse me, states that these funds were
10 used to make international payments on behalf of Iran,
11 including transfers in U.S. dollars, but passed through the
12 U.S. financial system in violation of the U.S. Sanctions laws.
13 And as counsel noted, paragraph 64 indicates that a billion
14 dollars, in fact, did pass through the U.S. financial system.

15 Now, the statutory allegations alone are sufficient to
16 show that this scheme targeted the U.S. And I'll turn it to
17 the Second Circuit's decision in *Atilla* in a second. But the
18 indictment does not rely solely on the statutory language, even
19 though those were sufficient. I will turn to paragraph
20 (indiscernible) --

21 THE COURT: Paragraph which?

22 MR. KAMARAJU: 33, your Honor.

23 THE COURT: Okay.

24 MR. KAMARAJU: Which makes clear that Halkbank was a
25 knowing participant in the scheme to route the money through

K9IPHALO

1 the United States, admittedly among other places. That
2 paragraph summarizes an e-mail between senior executives at the
3 bank, and that e-mail was sent June 20th, 2012, near the
4 beginning of the scheme. And in it Levent Balkan, one of the
5 bank's executives, said: "It is understood that this gold,
6 which is left in Dubai, can be used in all kinds of foreign
7 payments of Iraq, either in gold or in foreign currency." And
8 it goes on to say, in the next sentence, that "The fact that
9 these gold deposits are collected in the various fiduciary
10 accounts and used for international payments of the forbidden
11 Iranian banks in Dubai, such as Bank Melli, Bank Sedarat" --
12 and Melli is M-e-l-l-i, and Sedarat is S-e-d-a-r-a-t -- "or
13 Bank Mellat" -- M-e-l-l-a-t -- "in Turkey. The gold
14 transaction volume has reached remarkable dimensions in terms
15 of international Iran sanctions."

16 So the bank was clearly aware of what was going on,
17 and that's why the very first paragraph of the indictment notes
18 that the bank knowingly participated in enabling Iran's access
19 to the U.S. financial system.

20 Now, to be sure, that wasn't all the bank did. The
21 bank did facilitate \$20 billion worth of Iranian money to be
22 pooled in a slush fund in Dubai and Turkey. That much is true,
23 and it is also true that \$1 billion of that flowed through the
24 U.S. banking system.

25 Halkbank's argument that essentially the fact that

K9IPHALO

1 there was \$20 billion here but only \$1 billion went through the
2 U.S. is I think an analogy that helps reveal how meritless that
3 argument is, your Honor. This courthouse is very familiar with
4 international drug trafficking prosecutions.

5 Halkbank's argument essentially collapses to, the
6 government would not be allowed to prosecute a drug cartel if
7 the drug cartel ships 20 tons of cocaine to Europe, but only
8 one ton of cocaine to the United States. There is no court in
9 the United States that has ever held that, and it doesn't make
10 any sense because it is the shipment of the one ton to the
11 United States that violates U.S. narcotics laws.

12 The same thing is true here. It is the routing of the
13 \$1 billion in Iranian oil proceeds through the U.S. financial
14 system that violates U.S. sanctions laws and U.S. banking laws
15 and money laundering laws. And the Halkbank claim that this is
16 somehow a new allegation that the government has just cooked up
17 recently is belied by the charging language of the indictment,
18 clearly, and it is also belied by the Second Circuit's decision
19 in Atilla.

20 In Atilla -- and this is almost never mentioned in any
21 of Halkbank's papers or as we heard from defense counsel in his
22 argument now -- the Second Circuit affirmed Atilla's
23 convictions. And in affirming Atilla's convictions,
24 necessarily found that the scheme contemplated laundering the
25 money through the U.S. financial system.

K9IPHALO

1 In other words, necessarily not a primary sanction,
2 and it found that Atilla, a senior executive at the bank,
3 conspired to do that, so agreed. So, for example -- the *Atilla*
4 cite, for the court reporter, is 966 F.3d 118 (2d Cir. 2020) --
5 and at page 127, the Second Circuit says Atilla's conviction
6 for bank fraud and bank fraud conspiracy, therefore,
7 established that the jury found that beyond a reasonable doubt
8 that Atilla agreed to transfer money from the United States to
9 Iran.

10 And the Second Circuit also noted that the
11 government's allegations and its proof showed that it wasn't
12 just *Atilla*. At page 129, the court said: The evidence showed
13 that senior-level executives at Halkbank knew the particulars
14 of the scheme, including the importance of international
15 payments and of U.S. dollar transactions.

16 So by definition, the \$1 billion --

17 THE REPORTER: I'm sorry, there was some background
18 noise.

19 THE COURT: There was background noise, is what I
20 think what the court reporter is saying. I just want to remind
21 everybody who is on this call that if you're not speaking, so
22 anybody actually other than Mr. Kamaraju, at this point in time
23 should be muting their telephone.

24 Is what you were driving at?

25 THE REPORTER: Yes, your Honor. Thank you.

K9IPHALO

1 THE COURT: Did you want him to repeat any of his
2 remarks that you were unable to take down?

3 THE REPORTER: Yes, your Honor. Let me tell you where
4 I left off.

5 (Record read)

6 THE COURT: Sid, if you could pick up there,
7 discussing the \$1 billion?

8 MR. KAMARAJU: Yes, your Honor. No problem.

9 So the \$1 billion is necessarily part of the
10 conspiracy and the scheme that Halkbank agreed to participate
11 in. And so Halkbank's sort of repeated attempts, in multiple
12 arguments, whether it's the gravamen argument or the
13 extraterritorial argument, to minimize that is essentially
14 almost like a "what's a billion dollars worth of sanctions
15 between friends" kind of argument. And the fact is, it is a
16 billion dollars laundered through the U.S. financial system on
17 behalf of the world's foremost state-sponsored terrorism in a
18 country that the U.S. has expressly forbidden from using its
19 financial system.

20 And so, of course, the United States has an interest
21 and the ability to punish that kind of conduct. And I think
22 just properly characterizing the scheme deals with all of the
23 defense arguments, frankly. This is not an extraterritorial
24 application of the statute, for example. As in *Pasquitino*,
25 P-a-s-q-u-i-t-i-n-o, what is being punished here is the

K9IPHALO

1 domestic application, the domestic conduct in which the bank
2 participated.

3 And one of the reasons why the bank's argument misses
4 the mark is because their fundamentally trying to apply civil
5 context to a criminal prosecution. In a criminal prosecution,
6 you have conspiracy laws and you have laws related to schemes.
7 And conspiracy law, as a matter of bedrock principle, makes
8 acts in furtherance of the conspiracy chargeable to all of the
9 co-conspirators, regardless of which co-conspirator conducts
10 those.

11 So, and we'll get to this in a little bit when dealing
12 with the commercial activities section. So the bank's attempts
13 to sort of stop the scheme at, you know, the borders of Dubai
14 doesn't work.

15 Now, the principal problem is that they can't avoid
16 what the Second Circuit has already done in *Atila*, and so the
17 bank, instead, relies on yet another civil defense, and that's
18 sovereign immunity under the SSIA. That statute does not
19 apply.

20 Defense counsel essentially conceded that really the
21 question here is, where does this court get its subject matter
22 jurisdiction from? That's the central issue as to whether the
23 SSIA even applies in the first place. And notably, in
24 discussing the SSIA, counsel says, well, it gives jurisdiction
25 in non-jury civil actions, and then essentially excludes them

K9IPHALO

1 in everything else.

2 And the reliance on plain language that counsel is so
3 deeply invested in, does not appear to carry over to the plain
4 language of 18 U.S.C. 3231, which gives jurisdiction over all
5 offenses against the laws of the United States. There is no
6 carve out. There is no exception in that statute, and that
7 statute was enacted 30 years before the SSIA.

8 So to the extent defense counsel discusses the 200
9 years of former practice, the fact is that criminal
10 jurisdiction, absolute criminal jurisdiction over federal
11 offenses in District Court has been in place for decades before
12 the SSIA.

13 And, in fact, that's exactly what the only courts who
14 have considered this issue explicitly have held, and that's the
15 DC Circuit's opinion in *In Re: Grand Jury Subpoena*, which is
16 912 F.3d 623 (D.C. Cir. 2019). Now, what the DC Circuit did is
17 it decided not to address whether the SSIA applied to criminal
18 actions. It simply said, we'll assume for purposes of this
19 argument that it does, but nevertheless, it still proceeded to
20 hold that a federal District Court's jurisdiction over a
21 criminal action comes from 3231, and not the SSIA, essentially
22 explicitly rejecting the argument that Halkbank would like to
23 make. And we detail the language in our briefs, your Honor; so
24 I'm not going to go through every quote, but it is an explicit
25 rejection.

K9IPHALO

1 Now, the Second Circuit has applied a similar logic in
2 the case *United States v. Assa Corporation*. And "Assa" is
3 A-s-s-a, and the cite is 934 F.3d 185 (2d Cir. 2019). Now,
4 that case involved a civil forfeiture action against property
5 controlled in the United States by a bank owned by Iraq.

6 Now, in describing the SSIA's reach, the Second
7 Circuit held that it applied to lawsuits involving foreign
8 states, and it noted that SSIA didn't apply to civil forfeiture
9 actions against properties of foreign states because the
10 foreign property doesn't count as a foreign state under the
11 SSIA. Notably, it found that the immunity, therefore, that is
12 discussed in the SSIA is completely inapplicable to the statute
13 because there's an independent basis, which is sections 1345
14 and 1365 of Title 18.

15 The same logic applies here, your Honor, as the DC
16 Circuit found. The court has an independent basis for
17 jurisdiction, and since the jurisdiction comes from a different
18 statute than we have SSIA, the SSIA's immunity is simply
19 inapplicable.

20 Now, we detail at length in our brief some of the
21 textual arguments that apply, but I just want to highlight a
22 couple of them in response to what defense counsel cites. For
23 one, defense counsel talks about federal question jurisdiction
24 and repeal. I would recommend that the Court read what the
25 court -- the Supreme Court actually did in *Amerada Hess*

K9IPHALO

1 *Shipping Corporation*, where it addressed exactly the argument
2 that defense counsel is making by actually holding the --

3 THE COURT: Could you spell the name of that case?

4 MR. KAMARAJU: Yes, your Honor. It's *Argentine*
5 *Republic v. Amerada Hess Shipping Corporation*, and the cite is
6 488 U.S. 428, 1989, and we discuss that at page 8 of our
7 briefs, your Honor.

8 THE COURT: Okay.

9 MR. KAMARAJU: But the court discusses exactly this
10 question of implied repeal, even as applied to the federal
11 question statute. It makes no mention of Title 18 because
12 they're two completely different things. In no other universe
13 are the civil jurisdictional rules applicable to criminal
14 actions.

15 Now, the problem with Halkbank's argument,
16 fundamentally, is plain language cuts both ways even under
17 their argument. 3231 doesn't make any exceptions. So what
18 they said here is they take broad, untethered language from the
19 statute and argue that necessarily that must apply to criminal
20 actions, even though there are places in which the SSIA
21 specifically refers to criminal actions.

22 For example, section 1605 gives the Attorney General
23 the right to intervene to protect criminal investigations or
24 protections. So Congress clearly was aware of criminal
25 prosecutions when it passed the statute and could have said

K9IPHALO

1 this applies to criminal prosecutions as well, but chose not
2 to.

3 And that is exactly the logic that the Supreme Court
4 followed in the *Samantar* case -- and that's S-a-m-a-n-t-a-r --
5 where, in that case, the court was dealing with whether the
6 SSIA granted sovereign immunity to foreign officials. And one
7 of the reasons why the court had that it didn't is because the
8 statute in other places referred to foreign officials that did
9 not include them in the definition of foreign states. The same
10 logic holds here.

11 So, your Honor, this argument that somehow this
12 phrasing from section 1604 swallows up all of criminal
13 prosecutions and brings to mind a familiar adage from the
14 Supreme Court, which is: Congress does not hide elephants in
15 mouse holes, and that's from *Whitman v. American Trucking*
16 *Association*, 531 U.S. 457, at page 468.

17 Congress does not make such dramatic changes without
18 so much as a whisper, and that's the logic of the *Samantar* case
19 and it's the logic of several other cases in our brief
20 including, the *Southway* case. And that's particularly true
21 because in this case when you're talking about criminal
22 prosecutions, the fundamental interests that the SSIA were
23 intended to protect are simply irrelevant.

24 The SSIA, as discussed in its legislative history and
25 in the *Verlinden* case -- which is V-e-r-l-i-n-d-e-n -- is

K9IPHALO

1 targeted at giving private litigants certainty that they won't
2 be subject to the whims of foreign sovereigns pressuring the
3 State Department.

4 That's not a problem for the U.S. government. That
5 type of coordination already occurs and courts have repeatedly
6 recognized that. In *Pasquitino*, for example, the court said by
7 electing to bring this prosecution, the executive has assessed
8 this prosecution's impact on the nation's relationship with a
9 foreign state.

10 In *U.S. v. Noriega*, N-o-r-i-e-g-a, the court said a
11 similar thing, by pursuing this prosecution, the executive
12 branch has manifested its clear sentiment that Noriega should
13 be denied immunity.

14 And the Second Circuit said the same thing in *Assa*
15 when it talked about how the forfeiture action brought under
16 section 981 could only be asserted by the government and, thus,
17 when the executive branch seeks the forfeiture of a foreign
18 state's property, the judiciary is in no position to second
19 guess whether the lawsuit will harm our nation's foreign policy
20 goals.

21 That's plainly what Halkbank, though, is asking your
22 Honor to do. It is asking your Honor to save it from the
23 executive branch's decision to prosecute it. That makes no
24 sense. That is essentially a shotgun solution for a problem
25 that the SSIA was not even pretending to try to address.

K9IPHALO

1 And throughout its arguments, Halkbank never says why
2 Congress would choose to constrain the executive branch, who is
3 constitutionally mandated to handle foreign policy,
4 categorically. The only argument that Halkbank makes is, well,
5 the executive branch apparently has never done this before.
6 The fact that the government has refrained in the past is not
7 an indication that it does not have the power to do it. It is
8 simply a reflection on the balancing of the foreign policy
9 interests that we discuss, and so that doesn't help Halkbank.

10 Unless your Honor has any questions about that, I'd
11 like to turn to the exceptions of the statute.

12 THE COURT: Okay. Yes, so why don't you take another
13 five minutes or so. Is that going to be enough for you to
14 conclude?

15 MR. KAMARAJU: Yes, your Honor, and we have briefed
16 the remaining issues in our papers; so I just want to touch
17 briefly on the exceptions.

18 THE COURT: Okay.

19 MR. KAMARAJU: So I think, you know, when you properly
20 look at the scheme, the gravamen of the claim is the conspiracy
21 and the scheme to launder the money through the United States.
22 That is what gives rise to criminal liability, and so that's
23 the billion dollars.

24 Now, Halkbank has staked out, through the
25 extraordinary position that with respect to the first two

K9IPHALO

1 exceptions, its communications with U.S. officials about
2 sanctions compliance issues is not only not commercial activity
3 but is not even an act in furtherance of commercial activity.
4 That's directly contradictory to what, for example, Atilla
5 testified at trial when he talked about how Halkbank maintained
6 a sanctions compliance department and how Halkbank regularly
7 communicated with Treasury about its business. So that claim,
8 in and of itself, I think makes no sense.

9 But more importantly, this idea that those
10 communications, in and of themselves, are insufficient for the
11 government's claims ignores the Klein conspiracy, which is
12 specifically about misleading OFAC, and also ignores the fact
13 that concealment and protection of the scheme is an act in
14 furtherance of the overarching sanctions provision and, thus,
15 could very much be the basis for criminal prosecution. So I
16 think that --

17 THE COURT: Excuse me. Just so the record is clear,
18 did you say the Klein, K-l-e-i-n, conspiracy a minute or so
19 ago?

20 MR. KAMARAJU: Yes, your Honor. That's Count One of
21 the indictment.

22 And now with respect to the foreign conduct, the
23 foreign conduct prong also clearly applies, and as we noted in
24 our brief, the Second Circuit's decision in *Atlantica Holdings*,
25 *A-t-l-a-n-t-i-c-a*, effectively forecloses this question because

K9IPHALO

1 what the court held there was the locus of the injury, an
2 injury knowingly caused in the United States, is sufficient to
3 satisfy the direct affect requirement, and that's exactly what
4 you have here.

5 You have a plan by the bank and Iran, among others, to
6 victimize the United States and its financial institutions,
7 which was successfully completed to the tune of a billion
8 dollars. So there is no dispute, frankly, that there is a
9 direct affect.

10 Halkbank's arguments that somehow this is sovereign
11 action with respect to these transactions and the gold
12 transactions simply ignores the Second Circuit's decision in
13 *Peterson*, which is 895 F.3d 194, because all that the Turkish
14 government did by designating Halkbank as its repository is it
15 triggered the further scheme. That's not the basis for the
16 criminal action. It's what Halkbank did with the money
17 afterwards.

18 And if Halkbank's argument was true, then you would
19 never have an application of the commercial activity exception
20 because all actions are directed by a foreign sovereign that
21 implicate the SSIA. So for that reason, I think this sovereign
22 commercial distinction makes no sense, and I think if the Court
23 looks at our papers, you'll see plenty of citations for that
24 point.

25 And, finally, I'd just like to address what the bank

K9IPHALO

1 sort of attempts to do by intervening Zarrab's actions and
2 arguing that that somehow that influences --

3 THE COURT: In arguing? I'm sorry?

4 MR. KAMARAJU: That Zarrab's actions somehow sever the
5 causal connection.

6 THE COURT: I see.

7 MR. KAMARAJU: Zarrab was one of the bank's
8 co-conspirators. The bank cannot run away from his conduct
9 because it planned for him to engage in that conduct. That's
10 the allegations that are founded, and that's what distinguishes
11 this case and all criminal conspiracies, frankly, from the
12 cases that the defendant relied upon. Because in all of those
13 cases, the intervening steps are not participants in the
14 scheme. They are innocent actors, innocent independent actors.
15 That's not what you have here. What you have here is that you
16 have, by design, by design, Zarrab carrying the money to U.S.
17 banks.

18 So, your Honor, for all of those reasons we would
19 submit that the SSIA does not bar this. And I think your Honor
20 has already addressed personal jurisdiction, and we've
21 addressed it in our brief. So unless your Honor has any
22 further questions --

23 THE COURT: I do have one, which I'm going to pose to
24 you and then also to defense counsel, and that is this. It's
25 more of a comment.

K9IPHALO

1 So in this case, where we have Halkbank and we have
2 had Atilla, and we also have and had Zarrab, there has been a
3 ruling, as you both referred to, which is a Second Circuit
4 ruling which impacts the case that we're arguing over today,
5 which is the Halkbank situation. That is to say, the Second
6 Circuit's decision affirming the conviction and sentence of
7 Atilla.

8 You each, that is to say the government and the
9 defense, you each point to that decision, but I would just ask
10 you, and then I'm going to ask Mr. Latcovich to do the same, to
11 summarize again how you think that Second Circuit decision
12 impacts this proceeding that we're undertaking right now.

13 MR. KAMARAJU: Yes, your Honor. This is Sid Kamaraju.
14 The government's position is that the Atilla decision is a
15 ruling of the Second Circuit with respect to the very scheme
16 alleged in this indictment and is controlling.

17 The Second Circuit has viewed the indictments, viewed
18 the allegations underlying the scheme, and concluded that they
19 support IEEPA conspiracy involving primary sanctions, bank
20 fraud conspiracy, money laundering conspiracy and a subsequent
21 count of bank fraud.

22 The bank is certainly entitled to its day in court,
23 but it is not entitled to its own law. And what the Second
24 Circuit has now said clearly is that these allegations make out
25 those claims. So I think it is a controlling decision with

K9IPHALO

1 respect to this Court.

2 THE COURT: Got it. Okay. Thank you.

3 So we'll go back to Mr. Latcovich for rebuttal. We do
4 have some time for you. In addition to the remarks you want to
5 make, if you could also -- you did it I thought before. I just
6 want it crystalize your position, I should say the bank's
7 position, with respect to the Second Circuit decision in
8 Atilla, how it either helps you or helps the government or vice
9 versa.

10 MR. LATCOVICH: Sure, your Honor. And I think I can
11 do all of that within the five minutes that you mentioned
12 earlier.

13 Let's start with your question, your Honor. I think,
14 we submit that the Second Circuit's opinion in Atilla stands
15 for one thing, and one thing only, and that is that attempts --
16 evasion of secondary sanctions is not a crime. And that has,
17 as I'll discuss later, implications for the government's
18 charging decisions because I don't think the government
19 described accurately the chronology of events here.

20 The Second Circuit did not look at the sufficiency of
21 Atilla's indictment, much less our indictment. They are
22 different things, and so I don't think there is anything
23 binding about that. Frankly, it would be odd for me to say
24 that to the extent a court examined a sufficiency of the
25 evidence, a Court of Appeals examined the sufficiency evidence

K9IPHALO

1 of one case, and argue that that is controlling on the law in
2 another doesn't make sense to me.

3 Atilla did not make the same challenges to the Second
4 Circuit that we're making right now, and for that reason, I
5 don't think it speaks to the issue. So that is -- that's our
6 position.

7 And it actually dovetails right into my first point.
8 The government, at the beginning of its argument to set up
9 everything, created the wrong strawman. We never claimed that
10 the Atilla decision caused the government to indict Halkbank
11 differently. It couldn't have. The Atilla decision in the
12 Second Circuit came out after the Halkbank indictment.

13 The issue is that the Second Circuit Atilla decision
14 changed the law, and Halkbank was indicted on the assumption
15 that that entire \$20 billion, because the alleged \$20 billion
16 was unlawful because it violated secondary sanctions, and the
17 Second Circuit said, no, that's not the law. That is the
18 change in events and that makes a difference in this case.

19 The government is acting as if this 19 billion -- I
20 mean, I like the cocaine example of the 19 billion, one
21 billion. It's clever, but it is the wrong analogy. The
22 government in this case indicted all \$20 billion as if that
23 were a crime, and it's not. And the fact that it's not has
24 legal ramifications for this case.

25 And I think I described those at length in the

K9IPHALO

1 beginning, but those ramifications mean, for example, the
2 "based upon" language in secondary -- excuse me, in the
3 commercial activities section and the merely incidental
4 standard and the extraterritoriality. When the law changed, it
5 made the majority of that scheme no longer unlawful, the
6 government's own alleged scheme no longer unlawful. It changed
7 the legal analysis of all of these claims. That's the change.
8 Not anything else.

9 Second, your Honor, the government said that we ignore
10 conspiracy, and the idea that under a conspiracy, a
11 co-conspirator is responsible for the acts of others. Your
12 Honor, with all due respect, that's not the test here. The
13 government is trying to use co-conspirator law to rewrite the
14 legal tests for this.

15 For example, the commercial activities exception says
16 that the direct affect must be an immediate consequence of the
17 defendant's actions, not some third party.

18 Personal jurisdiction is the same. In fact, there are
19 cases that say it can't be based -- jurisdiction can't be based
20 on the actions of a co-conspirator.

21 So the co-conspirator exception and the law around
22 conspiracy is very powerful, but it does not change the law
23 regarding immunity, and it does not change the law regarding
24 personal jurisdiction.

25 Now, your Honor, to me, the most perplexing argument

K9IPHALO

1 the government made was this. 3231 has always provided
2 criminal jurisdiction forever and, therefore, the Foreign
3 Sovereign Immunities Act can't control here. But notably, the
4 government didn't cite any examples in which that jurisdiction
5 was used.

6 And, in fact, I can give you an example, your Honor,
7 of where the government is wrong. *In re: Investigation of*
8 *World Arrangements*, 13 F.R.D. 280, that's in the (D.D.C. 1952).
9 In that, the court, on sovereign immunity grounds, dismissed a
10 grand jury subpoena against a foreign state instrumentality.
11 If the government is right that 3231 would always provide
12 jurisdiction, that grand jury subpoena never should have been
13 quashed, but it was.

14 But even more surprising to me, your Honor, is that
15 the government didn't address the argument about federal
16 question jurisdiction that completely undermines their
17 argument. It can't be that the Foreign Sovereign Immunities
18 Act has no application if another statute says there's
19 jurisdiction, because there is a statute that says this court
20 has jurisdiction over all questions regarding federal statutes.
21 That doesn't trump the Foreign Sovereign Immunities Act any
22 more than the general criminal jurisdiction 3231.

23 Finally, your Honor, the government on a few occasions
24 implied that our reading of the statute would make the U.S.
25 powerless or the executive powerless to bring these claims. We

K9IPHALO

1 note this in our papers, your Honor. It can't be that we've
2 rendered the executive powerless when they've never, in fact,
3 exercised that power.

4 And more importantly, the executive still has the
5 power to prosecute individuals. It has the power to engage
6 sanctions. It has the power to engage in diplomacy. So a
7 ruling here that comports with hundreds of years of common law
8 and the repeated practice of the executive branch and the plain
9 language of Congress' statute only solidifies the status quo
10 and does nothing to undermine the power of the executive
11 branch.

12 Thank you, your Honor.

13 THE COURT: You bet.

14 Well, thank you, both sides. Very helpful, this oral
15 argument.

16 One technical matter, if you are interested in
17 ordering a copy of the transcript of today's proceedings, it
18 might save you some time if you indicate to the court reporter
19 at this point whether you wish to do that or not.

20 I, myself, will be asking the court reporter to send a
21 copy of the transcript to chambers so that we have it in doing
22 our analysis of the motion and the response by the government.

23 So again, I thank you both. That was excellent
24 presentations, and I think that's it for today, and we can be
25 adjourned.

K9IPHALO

1 Thank you. Thanks very much.

2 MR. KAMARAJU: Thank you, your Honor.

3 MR. LATCOVICH: Thank you, your Honor.

4 (Adjourned)

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25